



**Thiong'o v Tuti & another (Civil Appeal E346 & E338 of 2023  
(Consolidated)) [2025] KEHC 11549 (KLR) (14 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 11549 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E346 & E338 OF 2023 (CONSOLIDATED)  
DO CHEPKWONY, J  
APRIL 14, 2025  
CONSOLIDATED WITH HCCA NO.E338 OF 2023**

**BETWEEN**

**SYLVIA WAMBUI THIONG'O ..... APPLICANT**

**AND**

**CHARLES TUTI ..... 1<sup>ST</sup> RESPONDENT**

**TUTI SAFARIS LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of Hon. M. Kinyanjui, Principal Magistrate, delivered on 14th August, 2023 at the Chief Magistrate's Court at Kiambu in CMCC. No.124 of 2019)*

**RULING**

1. This is a ruling to determine the Notice of Motion application dated 20<sup>th</sup> November, 2024 wherein the Applicant/Appellant is seeking the following orders:
  - a. Spent.
  - b. That the Honourable Court be pleased to review its Judgment that was delivered on 23<sup>rd</sup> September 2024 and pronounce itself on the issue of the Motor Vehicle Registration Number KCS 553L.
  - c. That the Honourable Court be pleased to order the Respondents to give possession and/or deliver the Motor Vehicle Registration Number KCS 553L to the Appellant herself and or her agent, servant and/or employee.
  - d. That the Honourable Court be pleased to order the Respondent to give possession and/or deliver the Original Certificate of Registration /Logbook for the Motor Vehicle Registration Number KCS 553L to the Appellant herself and/or agent , servant and/or employee.



- e. That the costs of this application be provided.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Sylvia Wambui Thiongo sworn on 20<sup>th</sup> November, 2024. It is the Applicant's case that Judgment was delivered in favour of the Respondents on 23<sup>rd</sup> September, 2024 declaring that they are entitled to agency fee of Kshs 20,000/= . She holds that the Respondents have never given her possession of the motor vehicle and she continues to suffer great prejudice. The Appellant contends that it would only be fair that the court determines the issue of the release of the motor vehicle to her as she is not aware of where it is and the Respondents have refused to give the motor vehicle or its original documentations to her.
  3. The Application has been opposed through Replying Affidavit of Charles Tuti, the 1<sup>st</sup> Respondent sworn on 16<sup>th</sup> January, 2025 who explains that the case began vide Kiambu CMCC Case No. 124 of 2019 where the gist of the case was that the Appellant engaged the Respondents to import a motor vehicle for her and she paid a sum of Kshs 814,000/= for the same. That this was done and she got a driver to assist her bring the car from Mombasa port to Nairobi but unfortunately along the way it was involved in a road traffic accident. That the Appellant then rejected the motor vehicle in that condition, and on the advice of their insurer, Fidelity Insurance Company Limited, the Respondents took the car to Joginder Garage where it has been to date. That, he was also left with the original documentations.
  4. According to the Respondents, the trial court found the liable to pay the Appellant a sum of Kshs. 407,000/= being half of the amount paid for which they lodged an appeal against. Similarly, the Appellant also filed an appeal and the two were consolidated. On 23<sup>rd</sup> September, 2024, this court delivered a Judgment which set aside the Judgment of the trial court. It is the Respondents' case that they do not have any desire to hold on to the logbook and have only kept the same because the Appellant rejected the motor vehicle.
  5. Further, the Respondents contend that the Appellant is misleading the court by stating that she does not know the whereabouts of the subject motor vehicle as the Respondents have always indicated that it is stored at Joginder Garage. They hold that Fidelity Insurance Company Limited, being the insurer, authorised the said Joginder Garage to release the subject motor vehicle to the Appellant. The Respondents contend that the application is uncalled for as they do not have possession of the subject motor vehicle or any documentation thereto, hence cannot comply with any orders in that regard.
  6. The Respondents have urged that the Appellant has not satisfied the conditions under Order 45 of the Civil Procedure Rules for the orders sought to issue.

### **Analysis and Determination**

7. To determine the application dated 20<sup>th</sup> November, 2024, the court has read through the Affidavit in support thereof, and the Replying Affidavit and finds that the main issue for determination is whether the Applicant has demonstrated sufficient grounds to warrant this court review its Judgment and orders issued therein on 23<sup>rd</sup> September, 2024. Section 80 of the Civil Procedure Act provides that:-

80. "Review

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
8. The parameters for an application for review are under Order 45 of the Civil Procedure Rules, 2010 the following grounds exist:-
- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
  - (b) There was a mistake or error apparent on the face of the record; or
  - (c) There were other sufficient reasons; and
  - (d) The application must have been made without undue delay.
9. In essence Order 45 provides for the circumstances to be considered by a Court in an application for review, being that there must be demonstrated that there has been discovery of a new or important evidence which upon exercise of due diligence was not within the knowledge of the Applicant or could not have been produced at the time of hearing. Or there was a mistake or error apparent on the face of the record and or a demonstration of any other sufficient reason.
10. Therefore, a court ought to consider that it is necessary to correct the apparent error or omission on its part which error or omission must be self evidence, not requiring detailed arguments, examination and or scrutiny of facts or the law.
11. In the instant case, it is the Applicants case that the court having delivered Judgment in favour of the Respondents that they were entitled to agency fees, it ought to have determined the issue of release of the motor vehicle to her as she was not aware of its whereabouts and that the Respondents had refused to give the said vehicle and or its import documentations to her.
12. The Respondents on the other hand have submitted that they are not in possession of the said motor vehicle and or any documentation thereof as the same is with Joginder garage following the advice by the insurer, Fidelity Insurance Limited that it be taken there and it has even authorised the same to be returned to the Applicant. It is the Respondents contention that it cannot be ordered to release what is not in their possession as this will be in vain.
13. I have carefully read through the Judgment delivered on 23<sup>rd</sup> September, 2024, the grounds of appeal and the courts determination of the same. I find that the Applicant has not satisfied any of the conditions set out under Order 45 of the Civil Procedure Rules as what she seeks was determined by the court as follows:-

“At Paragraph 5 of the Judgment delivered on 23<sup>rd</sup> September, 2024, the court having considered the issue among others arising out of the Grounds of Appeal states:-

“However, these claims are not supported by any evidence and I dismiss the as unproved. The Appellant did not state these in her pleadings, and witness statement and it did not come out during the testimony in court. It is a well appreciated principle of law that parties cannot plead their cases through submissions”



14. Under Paragraph 37, the court goes on to state:-

“I am inclined to find that alongside the agency relationship with the 1<sup>st</sup> Respondent, the Appellants also entered into another separate agency relationship with the driver from Mombasa to Nairobi. He is rightly so because she allowed him to drive the vehicle to Nairobi and paid hi Kshs.10,000/= upon the delivery of the vehicle”.

15. Further, at Paragraph 43, the court stated:-

“Having found earlier that there was no seller-buyer relationship between the Appellant and the Respondent, it is of holding that the Appellant did not have the right to decline to take possession. This is because the 1<sup>st</sup> Respondent was her agent and not the seller. If she had reason to believe that the Respondents and the driver who drove the vehicle were negligent, her recourse laid in suing the for damages for the breach (if any) of their respective obligations to her as her agents”.

16. It is my considered view that the Applicant has not met the threshold for grant of the orders for review as she has not demonstrated the error, mistake or omission on the face of the record or availed any new or important matter that was not considered at the time of hearing the appeal or any sufficient reason why there should be a review.

17. Therefore, the Notice of Motion application dated 20<sup>th</sup> November, 2024 lacks merit and is hereby dismissed with costs to the Respondents.

18. It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 14<sup>TH</sup> DAY OF APRIL 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

No appearance by and for Appellant

M/S Njoroge counsel for Respondents

Court Assistant - Martin

